STATE OF MICHIGAN

COURT OF APPEALS

JAMES A. KARCHON and DENNIS M. KARCHON,

Plaintiffs-Appellees,

v

LAND WORKS LANDSCAPES, INC., LAWN WORLD, INC., C. KELLY O'DONNELL, and DOUGLAS S. GENDJAR,

Defendants-Appellants,

and

LWL LANDSCAPING,

Defendant.

UNPUBLISHED
March 21, 2006

No. 255513
Oakland Circuit Court
LC No. 02-040292-CB

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendants appeal by right the trial court's judgment in favor of plaintiffs. This case arises from plaintiffs' allegations that defendants' used plaintiffs' property in West Bloomfield Township without their permission. We affirm in part, reverse in part and remand for proceedings consistent with this opinion.

Defendants first argue that the trial court's damage award was improper because the award included compensation for rent and treble damages for damage to plaintiff's trees. We agree.

We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

First, defendants argue that the trial court clearly erred by imposing damages for rent in this case. We disagree. This Court has held that "there is no one fixed, inflexible rule for

determining the appropriate sum that will compensate a landowner" for a trespass. *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). Rather, a court should "apply whatever approach is most appropriate to compensate the plaintiff for the loss incurred." *Id*.

In this case, the trial court found that defendants trespassed on plaintiffs' property by using it for the commercial purpose of storing equipment. Presumably, defendants used plaintiffs' property because they had insufficient room on their adjoining property. This despite plaintiffs having denied defendants' request to use the property for this very purpose. Defendants argue that the testimony of the individual defendants reflected that they had permission to use the property at issue. But it is apparent that the trial court did not accept this testimony. In reviewing a trial court's factual findings, we give deference to its special opportunity to judge the credibility of witnesses. MCR 2.613(C). We find no clear error.

We also find that the trial court did not clearly err by awarding plaintiffs $27,000 in rent. Section 931 of the Restatement of Torts states, in relevant part, that

> [i]f one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages, include compensation for
>
> (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, . . . [4 Restatement Torts, 2d, § 931, p 551.]

Comment b to § 931 of the Restatement explains this principle as follows:

> The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the . . . land during the period of deprivation. This is true even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time. . . . [*Id*., Comment on Clause (a), p 552.]

The Restatement then provides the following example of the application of the principle explained in Comment b:

> A takes possession of and detains for six months B's land, which has a rental value for the period of $1000. B is entitled to receive this amount as damages although he never had used and would not have used the land during the period. [*Id*., Illustration 1 to Comment b.]

The comment and illustration of §931 of the Restatement of Torts exactly describes the situation at issue in this case and we apply it to the award for rent this case.

With respect to the trial court awarding treble damages for harm to plaintiffs' trees, we find that the trial court did not clearly err in its calculations. There is no dispute that the cost to restore damage to property can be a proper measure of damages for trespass. See *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 148; 500 NW2d 115 (1993). Further, MCL 600.2919(1) generally provides that a person who "despoils or injures any trees on another's lands . . . without the permission of the owner of the lands" is liable to the landowner for three

times the amount of actual damages. But MCL 600.2919(1) contains a proviso that if "it appears that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own," then only single damages should be awarded. A defendant bears the burden of proving the applicability of this proviso. *Stevens v Creek*, 121 Mich App 503, 509; 328 NW2d 672 (1982). Here, defendants have not established that the trial court clearly erred in its assessment of treble damages.

Nevertheless, we conclude defendants are entitled to relief. Although not raised directly in defendants' statement of issues presented, we believe that awarding damages for both rent and damage to trees results in plaintiffs obtaining relief beyond that to which they are entitled. If defendants had been allowed to rent the property the damage complained of would naturally have resulted to the trees. As an expected consequence of a rental, the rental amount would naturally take that consequence into consideration. Thus, to award both rent and damage to the property in effect results in an award that is excessive. Consequently, because the award for rent is greater than the award for the damages to the trees, we remand to the trial court with instructions to vacate the award for the damages to the trees.

Finally, defendants argue that the trial court erred in failing to apportion fault to each defendant in accordance with MCL 600.6304. We agree. The application of a statute is a question of law that this Court reviews de novo. *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 49; 693 NW2d 149 (2005).

MCL 600.6304(1) applied to this case, it provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
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> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d] regardless of whether the person was or could have been named as a party to the action.

Our Supreme Court has explained that 1995 tort reform legislation that included MCL 600.6304 has "eliminated joint and several liability in certain tort actions, [and] requires that the fact-finder in such actions allocate fault among all responsible tortfeasors, and provides that each tortfeasor need not pay damages in an amount greater than his allocated percentage of fault." *Gerling Konzern, supra* at 51.

From the record below, it is clear that defendants did not agree to waive the application of MCL 600.6304 and "[w]hen used in a statute the term 'shall' connotes a mandatory duty." *Ross v Dep't of Treasury*, 255 Mich App 51, 58; 662 NW2d 36 (2003). Therefore, the trial court was required to apportion fault to each of the four defendants and erred by failing to do so.

Moreover, the trial court's reliance on *Abel v Eli Lilly & Co*, 418 Mich 311; 343 NW2d 164 (1984), is misplaced because *Abel* predated the enactment of MCL 600.6304(1).

The trial court complied with MCL 600.6304(1)(a), which requires a determination of the total amount of plaintiffs' damages, but, when there are multiple parties at fault, the statute mandates that the court apportion damages according to the degree that each tortfeasor contributed to the injury. The trial court may find that there is sufficient evidence in the record to make such a determination. Alternatively, the court may hold an evidentiary hearing on the apportionment of liability.

We affirm in part, reverse in part, vacate the trial court's judgment, and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey